

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
License No. 506159 and MERCHANT MARINER'S DOCUMENT
Issued to: Michael Jay Riley Z-726 10 6340-D1

DECISION OF THE VICE COMMANDANT APPEAL
UNITED STATES COAST GUARD

2215

Michael Jay Riley

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 17 January 1979, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, after a hearing at Galveston, Texas, on 29 November 1978, suspended Appellant's license for a period of one month on probation for three months upon finding him guilty of misconduct. The single specification of the charge of misconduct found proved alleges that Appellant, while serving as Master aboard GULF FLEET NO. 22, under authority of the captioned documents, did, from 10 to 24 November 1978, fail to comply with the manning requirements as set forth in the vessel's Certificate of Inspection, to wit: sailing without a licensed engineer and one able seaman.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced into evidence the testimony of one witness and four documents.

Appellant testified in his own defense.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification as alleged had been proved. He then entered an order of suspension for a period of one month on probation for three months.

The decision was served on 19 January 1979. Appeal was timely filed on 8 February 1979, and perfected on 30 May 1979.

FINDINGS OF FACT

Between 10 and 24 November 1978, Appellant was serving under authority of his license and document as Master of GULF FLEET NO. 22. GULF FLEET is an inspected, freight motor vessel of 290 gross

tons, permitted to navigate the waters of the oceans, limited to the Gulf of Mexico within 150 miles of land while engaged in the offshore oil industry. During this period in question, Appellant, in knowing violation of the Temporary Certificate of Inspection issued to GULF FLEET, navigated the vessel absent one licensed engineer and one able seaman.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that (1) the Administrative Law Judge improperly denied a motion to dismiss the charge, made upon the conclusion of the Coast Guard case in chief; (2) hearsay testimony improperly was admitted at the hearing; (3) the order of the Administrative Law Judge was "unduly harsh;" and, (4) "policy factors" require vacation of the initial decision and order.

APPEARANCE: Vinson & Elkins, Houston, Texas, by Steven K. DeWolf.

OPINION

I

I agree with Appellant that the charge against him should have been dismissed upon the close of the Investigating Officer's case in chief. Nevertheless, at this stage in the proceedings I am constrained to affirm the decision and order of the Administrative Law Judge.

To satisfy his burden of proof, the Coast Guard Investigating Officer introduced into evidence four documents and the testimony of a Coast Guard Petty Officer assigned to the Galveston Marine Safety Office. The latter testified to his having made a telephone call to Coast Guard Headquarters during which he was informed that the person listed as the vessel's engineer on the Master's Report of Seamen Shipped or Discharged was not licensed. Of the documents admitted, the first two, the Affidavit of Service and the Certification of Shipping Articles, are of no substantive concern here. The third is the Report of Seamen Shipped or Discharged. This document discloses that, in addition to Appellant himself, six people were engaged for service aboard GULF FLEET NO. 22, on 10 November 1978. The six were engaged in the following capacities:

- (1) Mate
- (2) Engineer
- (3) Ordinary Seaman

(4) Able seaman

(5) Wiper

(6) Steward

This report indicates further that only the Master and the Mate held licenses. It does not disclose a date or place of discharge for any of those described above. The report was signed by Appellant.

The fourth document was a Temporary Certificate of Inspection issued for the vessel GULF FLEET NO. 22. The obverse of this document contains nothing about manning requirements but does include the statement that the following are "PERSONS ALLOWED TO BE CARRIED,"

Officers and Crew 7
Persons in addition to crew 14
Total No. allowed 21

Upon the reverse in the following statement, "[w]hen operating not more than sixteen (16) hours in any twenty four hour period, the crew may be reduced to the following six (6)[sic] personnel.

One (1) Master
One (1) Licesed[sic] mate
One (1) Licensed Chief Engineer
Two (2) Able Seaman[sic]"

As recapitulated above, this was the entire substance of the Investigating Officer's proof when he concluded his case in chief. Appellant then moved to have the charge dismissed. The Administrative Law Judge denied this request. I conclude that this denial was in error because the Investigating Officer had failed to establish a prima facie case.

Normally, when a manning violation has been committed, admission into evidence of the properly completed Master's Report of Seamen Shipped or Discharged and the vessel's Certificate of Inspection will suffice to establish a prima facie case against the Master. See, e.g., Decisions on Appeal No. 2136, 2146. Here, however, further inquiry was necessary because the Temporary Certificate of Inspection was defective. 46 CFR 2.01-5 requires, inter alia, that a Certificate of Inspection contain "the minimum manning requirements." The Temporary Certificate of Inspection described above contained manning requirements applicable only "when operating not more than sixteen (16) hours in any twenty four hour period." Nevertheless, because the endorsement on the reverse

of the Temporary Certificate of Inspection speaks of a "reduced" crew, it reasonably can be inferred that the five (not six) capacities listed there always are required. By fair implication, it further can be inferred from the Report of Seamen Shipped or Discharged that (1) only one able seaman had been engaged, not two, and (2) that the engineer engaged to serve aboard GULF FLEET possessed no license. Had the Report of Seamen Shipped or Discharged contained information indicating that a voyage had been undertaken (e.g., through disclosure of a discharge effected at a "place" other than the "place of engagement"), comparison of the Report with the Temporary Certificate of Inspection would have sufficed to establish a prima facie violation of the latter. The Report in evidence in this case, however, does not contain such information.

A related omission in the Coast Guard case in chief also exists. Appellant was charged with inter alia, "sailing [from 10 to 24 November 1978] without a licensed engineer and one able seaman. "[emphasis added] It is clear that none of the evidence presented by the Investigating Officer established that Appellant had sailed anywhere between 10 and 24 November 1978. Hence, when the Investigating Officer rested and Appellant moved to dismiss the charge, the Administrative Law Judge should have granted Appellant's motion.

The failure of the Investigating Officer to present a prima facie case notwithstanding, the charge against Appellant ultimately was proved adequately. After the Investigating Officer had rested, Appellant chose to testify. Appellant admitted that he had navigated GULF FLEET during the two week period in question, and had sailed with a deficiency of at least one able seaman and one licensed engineer. In proceedings such as these, "testimony of the person charge himself may be utilized to fill gaps in the prima facie case in the absence of a stipulation to the contrary." Decision on Appeal No. 1721.

II

Appellant contends that the testimony of the Coast Guard Petty Officer should have been excluded as inadmissible hearsay. In a strict sense, this testimony did satisfy the requisites for admission under 46 CFR 5.20-95(a). Because only five days had elapsed between the service of charges and the date of the hearing, this appears to have been a reasonable means of securing evidence to buttress the implication already created by the Master's Report of Seamen Shipped or Discharged, that the engineer aboard GULF FLEET had no Coast Guard license. In any event, Appellant's admission disposed of any question as to the licensed status of the engineer.

III

Appellant contends that the sanction awarded by the Administrative Law Judge is "unduly harsh" and that "policy factors" require vacation of the Administrative Law Judge's order.

As to the first contention, it will suffice for me simply to observe that, in this case, a one month suspension on three months' probation does not appear "unduly harsh" or in conflict with the remedial purpose of these proceedings. See, Decision on Appeal No. 2167.

As to the second, Appellant argues at length that the Coast Guard recently has adopted a policy of "cracking down" on manning violations in the Eighth Coast Guard District, and that the Coast Guard should revert to its former, more lenient enforcement policy. Appellant has presented no evidence to support any of this argument. Moreover, inasmuch as it is clear that Appellant did commit the violation charged, it is irrelevant whether his violation was discovered as the result of a "crackdown." Since there is no reason to believe that Appellant's violation was discovered illegally, or even unfairly, there is likewise no reason to dismiss the charge which resulted from that violation.

ORDER

The order of the Administrative Law Judge, dated at Houston, Texas, on 17 January 1979, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 29th day of May 1980.

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